

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF WISCONSIN

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4 UNITED STATES OF AMERICA, )  
5 )  
6 Plaintiff, ) Case No. CR 06-320  
7 ) Milwaukee, Wisconsin  
8 vs. ) January 3, 2008  
9 ) 2:08 p.m.  
10 DAVID OLOFSON, )  
11 )  
12 Defendant. ) **ELECTRONICALLY  
RECORDED**  
13 -----

14 **TRANSCRIPT OF FINAL PRETRIAL CONFERENCE**  
15 BEFORE THE HONORABLE CHARLES N. CLEVERT, JR.  
16 UNITED STATES DISTRICT JUDGE

17 APPEARANCES:

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## P R O C E E D I N G S

(Audio file commenced at 2:08:40 p.m.)

THE CLERK: Case Number 2006-CR-320, United States of America v. David Olofson. This matter is before the court for a final pretrial conference. May we have the appearances, please?

MR. HAANSTAD: Good afternoon, Your Honor, Gregory Haanstad for the United States.

THE COURT: Good afternoon, sir.

MR. FAHL: Good afternoon, Your Honor, Brian Fahl and Brian Mullins appear on behalf of David Olofson who appears today in person.

THE COURT: Good afternoon to all of you as well.

As noted, this matter is here for a final pretrial conference. The court is also in receipt of an amended report filed as of today's date.

Are there any other matters outside of the report that you need to highlight at this time?

MR. HAANSTAD: Your Honor, I think that there are I believe two additional matters. There is currently pending before the court a motion to compel discovery. That was filed on December 30th. And I apologize, I had a few documents put in a folder and I must have left it in my office, I don't have it in front of me. But the government has nothing responsive to any of those requests. And I don't know if the court would like to go one by one, if that would be helpful or not, but the

1     overarching problem --

2             THE COURT: Let me see if that's in my file. I'm not  
3     sure I had that brought to my attention.

4             No, I do not have anything concerning that motion.  
5     Let me pull it up. My computer is not on.

6             (Pause.)

7             THE COURT: Why don't you go ahead while the clerk is  
8     getting that document.

9             MR. HAANSTAD: Sure. The defense has made a couple of  
10    requests of the government and U.S. Attorney's Office by letter  
11    along the same lines as what's contained in the motion to compel  
12    discovery. And our response all along has been essentially the  
13    same, and that is that those documents really aren't relevant to  
14    any matter that's in issue in this trial. And none of those  
15    matters are discoverable under Rule 16. That is, to the extent  
16    they are discoverable under Rule 16 the government has already  
17    provided them.

18            Now, in this motion to compel discovery the defense  
19    contends that these things are discoverable pursuant to Brady.  
20    And again, it's a little different variation I suppose on the  
21    same theme. That is, because none of this -- because none of  
22    this evidence is relevant it's difficult to see how it can  
23    possibly contain any exculpatory information, but it did.

24            Two issues that are present in this case; that is, the  
25    two elements that the government has to establish are that,

1 first of all, this particular weapon with this particular serial  
2 number that at one time belonged to Mr. Olofson and was later  
3 transferred to another individual in northern Wisconsin, was a  
4 machine gun; that is, that it fired automatically more than one  
5 shot with a single function of the trigger.

6 Second, the government has to establish that the  
7 defendant knew that this particular firearm was a machine gun.  
8 None of the documents that are requested here really address  
9 that.

10 These are a lot broader sorts of requests that relate  
11 to ATF testing procedures in general and that relate to  
12 classifications of particular models of firearms, but none of  
13 those documents relate to this particular firearm that's at  
14 issue in this case.

15 THE COURT: Does the defense wish to be heard?

16 MR. FAHL: Yes, Your Honor. And I have some I guess  
17 specific responses to each of the eight items of discovery that  
18 we're requesting.

19 Regarding -- does Your Honor have it yet?

20 THE COURT: She's getting the file. Not at this  
21 point, thank you. Go ahead.

22 MR. FAHL: Well, with regard to item number one which  
23 we're asking for documents pertaining to the reports of  
24 technical examination of this particular gun, Mr. Haanstad has  
25 informed me that there is nothing out there that we don't

1 already have. And the video that, while it cannot be produced,  
2 if not allowed to be produced we can go see it at the ATF  
3 headquarters. And so in that regard I guess number one --

4 THE COURT: So, insofar as the first request is  
5 concerned you've asked for and the government has indicated that  
6 it does not have any technical examination reports. All right,  
7 so why is there a motion being filed with respect to that?

8 MR. FAHL: Well, that was not clarified until after  
9 the motion was filed.

10 THE COURT: So you're withdrawing that aspect of the  
11 motion.

12 MR. FAHL: That aspect, yes.

13 THE COURT: All right, go ahead.

14 MR. FAHL: Number two, a copy of testing procedures  
15 that FTB, which is the training branch the ATF uses in the  
16 examination, we feel that that is relevant to the published  
17 testing procedures that were in place here.

18 There were two tests. The first test came back as a  
19 non-machine gun, and the tester opined that it was a condition  
20 called hammer follow. The special agent investigating the case  
21 asked for a second test using a more sensitive ammunition.  
22 Using this more sensitive ammunition there was then multiple  
23 firings.

24 And I think where there's no, if there's a policy in  
25 place regarding the use of the more sensitive commercially

1 available ammunition, if that's approved or is that just  
2 something that was kind of happened in this case in a  
3 case-by-case basis --

4 THE COURT: Okay, let me stop you there. You're  
5 asking for a published testing procedures. When you say  
6 published what do you mean?

7 MR. FAHL: Published in an ATF manual, some sort of  
8 policy that ATF has regarding testing procedures.

9 THE COURT: All right. And is the government saying  
10 that there is no, you do not have such documents?

11 MR. HAANSTAD: Well, Your Honor, the U.S. Attorney's  
12 Office doesn't.

13 THE COURT: Well, that's not the point.

14 MR. HAANSTAD: No, no, I'm sorry. My understanding is  
15 that ATF does not have specifically -- I guess when I heard  
16 published that was one of my initial responses was to the extent  
17 that it's published it's public and not within the exclusive  
18 control --

19 THE COURT: That was my original reaction as well.

20 MR. HAANSTAD: But if the actual request is for  
21 anything that's written, whether it's public or not, I can  
22 follow up and ask ATF again. But, the government's response  
23 would still be the same, and that is that material is not  
24 exculpatory and is not relevant to the issue, the disputed  
25 issues in this case.

1           THE COURT: Well, the first thing we do need to find  
2 out is whether or not this is an academic exercise. I.e., is  
3 there nothing in writing that would be responsive to the defense  
4 request? If there is no such information in writing, then we  
5 need not go to the second question or the plateau which is  
6 whether or not such evidence is admissible in evidence. Whether  
7 or not it's relevant depends on the context. And at this point  
8 in time we really don't have a clear context for this discussion  
9 because no expert has testified, and I don't know whether or not  
10 any expert will reference any policy or procedure or manual in  
11 his or her testimony. You have not said so and I can't offer  
12 any opinion on the subject in a vacuum.

13           MR. HAANSTAD: If Your Honor is inviting a response  
14 here --

15           THE COURT: I am.

16           MR. HAANSTAD: The Firearms Technology Branch officer  
17 who is going to testify will be providing in a way not expert  
18 testimony. That is, it's testimony that's based on his own  
19 firsthand experience and his own perceptions when he pulled the  
20 trigger of this particular firearm.

21           In that regard it's essentially Rule 701 evidence.  
22 And the way in which it potentially becomes a matter of expert  
23 testimony is that the expert will probably also testify as to  
24 why this particular firearm fired automatically. Now, that's  
25 not an element of this offense. That is, I think the

1 government's position would be that first element, that is, that  
2 the firearm operated as a machine gun, can be established  
3 through lay opinion testimony. It's a little bit difficult to  
4 understand how it is that the existence or nonexistence of any  
5 particular procedures could bear upon whether or not when this  
6 particular firearm was test fired it fired automatically.

7 THE COURT: Yes.

8 MR. HAANSTAD: And the witness that the government is  
9 going to call to establish that during these test fires the  
10 weapon fired automatically is not going to provide testimony or  
11 draw any conclusions or inferences based on the existence or  
12 nonexistence of any particular policies. He will simply testify  
13 that on three different occasions he put ammunition into this  
14 firearm and pulled the trigger. And as Mr. Fahl said, on the  
15 first occasion the weapon did not fire automatically. And he  
16 will testify as to why in his opinion that was the case.

17 He'll testify that during that first test fire he used  
18 military grade ammunition which has a thicker or a harder or  
19 difficult to penetrate primer on it, so that although the second  
20 round was chambered after the first round was fired, the hammer  
21 did not hit that second round with sufficient force to crack  
22 that thicker primer.

23 On the second test fire this officer used civilian  
24 grade ammunition and loaded the weapon with I believe it was 10  
25 rounds three different times, and with respect to each of those

1 three different times the weapon did fire automatically. Those  
2 reports both have been made available to the defense.

3 And finally, there's a third test fire that the  
4 government arranged at the direction of Judge Stadtmueller when  
5 the case was still assigned to him. There was some question  
6 initially in this case as to why it was that no defense expert  
7 had examined the firearm or had really examined any documents  
8 with respect to those test fires that I just mentioned. And to  
9 sort of alleviate any potential problems in front of the jury as  
10 to whether or not this weapon actually fired automatically,  
11 Judge Stadtmueller ordered that the government arrange a third  
12 test fire and that the government make arrangements for that  
13 test fire to be open to the defendant, defense counsel who at  
14 that time was different counsel from present, and the defense  
15 expert. Again, that video-recorded test fire involved the same  
16 officer putting commercial grade, civilian grade ammunition into  
17 the firearm and testing it I believe another three times, and on  
18 each of those three times it fired automatically.

19 So none of that evidence and none of that testimony is  
20 going to bear in any way upon the existence or nonexistence of  
21 any written procedures the ATF has.

22 THE COURT: Well, that may very well be. But the  
23 question then is whether or not there is such material. That  
24 still doesn't answer the basic question.

25 MR. HAANSTAD: Right.

1           THE COURT: And whether or not you believe it's  
2 relevant is not key. It may not be relevant to your case in  
3 chief, it may very well be relevant to the defense case in  
4 chief.

5           MR. HAANSTAD: And, Your Honor, I think I was a bit  
6 sloppy here and sort of blended two things, that is, the  
7 question of relevance and the question of whether or not this  
8 material is exculpatory. They're somewhat related, I think, but  
9 still are distinct inquiries. And the government certainly will  
10 make the inquiry at ATF to see whether or not these things  
11 exist.

12           But I know that with respect to some internal  
13 documents that ATF has, the agency has some concern about  
14 disclosing those. So I just want to make clear that I will see  
15 if they exist and I'll undertake my own independent examination  
16 to see whether in my opinion those materials are exculpatory.  
17 And maybe it's just a question we have to address later on as to  
18 whether if those materials do exist the government's required to  
19 turn them over under Brady.

20           THE COURT: I think that is certainly the way to best  
21 approach the defense motion.

22           MR. HAANSTAD: Okay.

23           THE COURT: Because the determination of whether or  
24 not the information is exculpatory cannot be made unless you  
25 know exactly what the material is. And inasmuch as you don't

1 know what the material is it's difficult for you to take a  
2 definitive position and bind the government and thereafter cause  
3 this court to rule on a matter in a vacuum.

4 All right. So, as far as the materials are concerned  
5 how much time do you think you might need to find out exactly  
6 what exists and the position you will have to take with respect  
7 to anything that does exist?

8 MR. HAANSTAD: I addressed this with some people in  
9 the Firearms Technology Branch at ATF in West Virginia when I  
10 received the motion on December 30th, and they've been in the  
11 process of trying to pull together what they can that's  
12 responsive to -- some of them are more easily answered than  
13 others. And in all candor I think part of the problem is that  
14 it was the holiday season and they're short staffed there. But  
15 I spoke with two individuals, Max Kingery and Richard Vasquez  
16 from the Firearms Technology Branch just this morning, and as of  
17 this morning they were still putting together what they could  
18 that was responsive to these requests.

19 I guess that's a long way of saying I'm not sure how  
20 long it will take. I would have to check to see what the  
21 progress is right now.

22 THE COURT: One second here.

23 (Pause.)

24 THE COURT: I think it's certainly appropriate for the  
25 court to raise a question regarding the timing of this motion.

1 The deadline for filing motions has passed in this case, that  
2 is, discovery related motions and all pretrial motions except  
3 for, of course, motions in limine.

4 I note too that Mr. Fahl appeared in this matter as of  
5 August 21st, and that the motion for discovery was filed on  
6 December 28th. That motion followed a request of the defense to  
7 adjourn the trial. That motion to adjourn was filed on December  
8 6th, and it was for various purposes, such as to give the  
9 parties an opportunity to seek a resolution of this case short  
10 of trial, to investigate potential defenses including  
11 consultation with an expert witness who needs additional time to  
12 complete her investigation and prepare for trial in case trial  
13 is necessary, et cetera.

14 So, Mr. Fahl, can you tell me about this motion, and  
15 in particular why I should consider the motion at this late  
16 date? And in responding please advise whether or not there is  
17 an expert defense witness who needs this information since it  
18 has a bearing on the government's efforts to secure the  
19 information and any trial that will have to consider that  
20 information.

21 MR. FAHL: Yes, Your Honor. As I note in the motion,  
22 I requested this information for the first time on September  
23 25th, 2007, by letter to Mr. Haanstad. And that was prior to  
24 what was going to be the originally scheduled trial.

25 Mr. Haanstad, and I responded I believe with regard to

1 items one and three on the discovery request, but that he didn't  
2 think there was anything else with the video and that he didn't  
3 believe Special Agent Keeku had any certificates and in any  
4 regard she wasn't going to testify in as such as an expert that  
5 she would need that there was a development.

6 And that was a conversation we had I believe in the  
7 hallway downstairs and was never memorialized. There was no  
8 more contact with Mr. Haanstad so I filed a second request, and  
9 that request was filed on December 10th, 2007, and both of those  
10 letters should have been attached to the motion, that indicated  
11 our earlier conversation and requested the still outstanding  
12 documents or the things that we have not requested.

13 Defense counsel has retained expert witness,  
14 originally Len Savage from Georgia who is the president of  
15 Historic Arms LLC. He has extensive experience with machine  
16 guns and automatic weaponry.

17 The defense has two positions:

18 One, this is not a machine gun as defined under the  
19 statute. And number two, if there were any multiple firings,  
20 those multiple firings were due to a malfunction. And a  
21 malfunction that can be caused by a thing such as soft primered  
22 ammunition, but that does not make this particular gun a  
23 firearm.

24 So each of these items requested has some bearing on  
25 his testimony and the potential cross-examination of Mr. Kingery

1 or Mr. Vasquez.

2 THE COURT: All right. And again, why the tardy  
3 submission?

4 MR. FAHL: Well, Your Honor, I was hoping that we  
5 could resolve this with the government short of filing a motion  
6 to compel discovery. And usually in these cases we do, but we  
7 were unable to resolve it and that's why I filed the motion.

8 THE COURT: Mr. Haanstad, can you comment on the  
9 timing of the motion?

10 MR. HAANSTAD: Well, I think that Mr. Fahl is right.  
11 I don't have notes documenting times or dates, but that sounds  
12 about right. But our position from the beginning has been as it  
13 is now, that is, that we're not required to disclose these  
14 things because they're not exculpatory and otherwise  
15 discoverable under Rule 16.

16 And I know that the court's rules contemplate that the  
17 parties meet and if there is some sort of dispute over discovery  
18 like this that a motion to compel discovery then is filed  
19 documenting these previous efforts.

20 I don't know -- I have nothing further to add with  
21 respect to what happened between September 25th, I believe it  
22 is -- I'm sorry, September 10th I think it was, but at the first  
23 letter request, and the three months that passed before the  
24 discovery motion was filed. Again, our position has been the  
25 same from the beginning and remains the same today.

1           THE COURT: Well, I know the letter that's attached to  
2 the motion is dated December 10th and not September 10th.

3           MR. FAHL: There's the September 25th. There should  
4 have been two letters attached. September 25th was the first  
5 one and the second was December 10th.

6           THE COURT: I only have a December 10th letter here.

7           MR. FAHL: December 25th. September 25 and then  
8 December 10. I have a copy of the September 25 letter.

9           THE COURT: Okay, well, would you hand it up? Because  
10 what I was handed was just a December 10th letter.

11           (Pause.)

12           THE COURT: The first attachment that I have is a page  
13 2, it says September 25th at the top. It's only the second  
14 page. And it shows a citation to 11, United States vs. Staples  
15 N.D., Oklahoma.

16           So apparently what happened in your submission was you  
17 attached something in part but not the entire document because I  
18 do have that. I thought it was just a misprint.

19           MR. FAHL: I apologize, Your Honor.

20           THE COURT: Because the docket does not have a  
21 complete copy of what you're referring to.

22           All right. I'll accept this. What about the other  
23 aspects of your motion?

24           MR. FAHL: They're all similar items. If you want I  
25 can discuss what I believe is the relevancy of each particular

1 item.

2 THE COURT: And why should the government provide  
3 this? For example, you're talking about training certificates,  
4 diplomas, levels of expertise, et cetera, on the AR-15 and the  
5 M-16 firearms for Special Agent Jody Keeku.

6 MR. FAHL: Because it was Agent Keeku who requested  
7 the second test using the soft primered ammunition. I believe  
8 we would need -- if she does not have any expertise or training  
9 on the M-16 or AR-15 type of firearms, especially as it relates  
10 to the ammunition that goes in, it definitely called into  
11 question the reasoning behind the second test. And this kind of  
12 all goes into the testing procedures.

13 The ATF, it's been well documented, has, I'm trying to  
14 think of the word, but the -- can manipulate, they manipulate  
15 their testing procedures over time and it makes it very hard.

16 In fact, there is pending currently before Congress  
17 H.R. 1791 which was introduced by Congressman Gregory Georgia to  
18 alleviate such a problem, not necessarily in cases of criminal  
19 prosecutions, but for manufacturers of firearms who are having a  
20 significant problem in the fact that there is -- really seems to  
21 be a lack of testing procedures and --

22 THE COURT: Let's be more specific. What aspect of  
23 the Federal Rules of Criminal Procedure entitle you to  
24 information concerning certificates of this person? You cited  
25 in your motion Rule 16(b)(1)(C), and you've suggested that

1 you're entitled to Brady material, but what in particular would  
2 entitle you to a certificate regarding this particular ATF  
3 agent?

4 MR. FAHL: Again, you know, really the, under Brady,  
5 this is the type of evidence that would show whether or not  
6 there was an understanding of what was happening by ordering the  
7 soft primered ammunition test.

8 THE COURT: But why would this be exculpatory  
9 material?

10 MR. FAHL: Because if it was -- if the purpose of the  
11 soft [Inaudible] test was to introduce a multiple firing and  
12 believe that would demonstrate --

13 THE COURT: But what does that have to do with a  
14 certificate?

15 MR. FAHL: Well, it goes to the special agent's  
16 expertise.

17 THE COURT: That's not exculpatory. Whether or not a  
18 man has a driver's license, if a police officer has a driver's  
19 license it doesn't make it more or less likely that somebody  
20 caught behind the wheel of a car is licensed. If a special  
21 agent has a certificate for a particular weapon it doesn't make  
22 it more or less likely that the weapon is or is not a machine  
23 gun.

24 MR. FAHL: No. That's true, Your Honor.

25 THE COURT: So why is this exculpatory? Why are you

1 entitled to it under any federal rule of criminal procedure? It  
2 sounds to me like you're asking for material that may be  
3 utilized in cross-examination, or may be the subject of argument  
4 that may call into question whether or not things were done  
5 fairly in your view, but that in and of itself does not indicate  
6 that these materials are Brady material or that you're entitled  
7 to receive this under any rule of criminal procedure.

8 MR. FAHL: I can understand that specifically with  
9 item number 3, Your Honor. But, for example, item number 4  
10 discusses this particular gun, not the serial number but this  
11 particular manufactured -- the gun was manufactured --

12 THE COURT: Before we go on to number 4 --

13 MR. FAHL: Okay.

14 THE COURT: -- let's deal with number 3. Would you  
15 agree after discussion that this would not constitute Brady  
16 material?

17 MR. FAHL: Yes. I agree, Your Honor.

18 THE COURT: So you withdraw this request?

19 MR. FAHL: We will withdraw number 3, Your Honor.

20 THE COURT: Okay, number 3 is withdrawn.

21 4, correspondence.

22 MR. FAHL: Number 4 will indicate that the ATF was  
23 aware that the gun at issue here was manufactured with M-16  
24 parts.

25 THE COURT: Yes.

1 MR. FAHL: And I believe that's part of the  
2 government's theory of why this is a machine gun is because it  
3 has M-16 parts. Well, and this goes on to, it's connected to 5  
4 and 6. The ATF has often said that this particular firearm, at  
5 least based on representations of our expert witness, that this  
6 particular firearm, the CAR-AR-15 by SGW Olympic Arms, is not a  
7 machine gun, unless it has an M-16 bolt carrier or an auto sear  
8 attached to it. And 4, 5 and 6 would be items that would  
9 document this fact.

10 THE COURT: Mr. Haanstad?

11 MR. HAANSTAD: Judge, our position again is that none  
12 of these things are discoverable under Rule 16. I think if  
13 they're discoverable at all, or disclosable at all maybe is the  
14 most appropriate term, it's under Brady.

15 And as with item number 2, again, Mr. Fahl has said  
16 these determinations relate to this particular firearm, they  
17 don't relate to this particular firearm, they relate to this  
18 model of firearm. But the fact that, for example, a  
19 manufacturer may manufacture this gun as a machine gun doesn't  
20 mean that Mr. Olofson can possess or transfer that machine gun.

21 The question here again is whether or not this  
22 particular gun, this particular firearm with this particular  
23 serial number fired automatically. And whatever may or may not  
24 have been said with respect to other guns and other tests really  
25 has no bearing upon whether or not Mr. Olofson's firearm was a

1 machine gun. So, again, I think it's the same problem that we  
2 had with respect to number 2.

3 Now, that being said, with respect to 4, 5 and 6,  
4 again, at this point I don't know exactly what's out there.  
5 I've spoken to ATF, and more specifically the firearms  
6 technology branch about this, and at that point my concern was  
7 that there is somewhere buried in this material some sort of  
8 determination with respect to Mr. Olofson's machine gun, just  
9 because of the way that the request was presented in the motion,  
10 and they assured me that that's not the case, that these are  
11 much more general than that.

12 That being said, I was satisfied that those materials  
13 were not exculpatory and were not subject to disclosure under  
14 Brady.

15 Now, if the court would like I can inquire further,  
16 again reserving the right to make another independent assessment  
17 as to whether or not in light of new information there is any  
18 exculpatory information in any of these requests.

19 THE COURT: Again, I would agree with that approach.  
20 It seems to me that we don't need to have an exercise  
21 unnecessarily, and so that we need to first determine whether or  
22 not there are any such documents that would be responsive to the  
23 defense request, and, if so, whether or not the government  
24 believes it should turn over that information as Brady material  
25 or for other reasons under the Federal Rules of Criminal

1 Procedure. And if the government does not, if these things  
2 exist and the government believes it should not turn over the  
3 materials for reasons such as they're not relevant or they are  
4 not discoverable because of some other privilege that the  
5 government might cite, then we'll deal with that as it arises.

6 So, in light of what we've discussed we need to find  
7 out when we will be able to make some kind of determination, and  
8 I gather you can't say at this point in time, Mr. Haanstad,  
9 correct?

10 MR. HAANSTAD: I can't. I can do my best to find out  
11 by the end of the day.

12 THE COURT: All right. I think that probably would be  
13 the prudent course. And in light of that I think we need to set  
14 this motion aside.

15 MR. FAHL: Okay. And just to clarify, based on our  
16 other conversation I'm going to withdraw items 7 and 8 from the  
17 motion as non-discoverable under Brady.

18 THE COURT: All right.

19 MR. FAHL: And I want to note one other thing. In  
20 footnote one on the motion, we talked about some other requests  
21 for some publicly available ATF rulings and things.

22 Mr. Haanstad said that he wasn't going to disclose those,  
23 however, if they were in fact relevant or necessary for  
24 examination, he would not object to their authenticity.

25 And I just wanted to put that on the record that,

1    yeah, I understand he's not waiving any other evidentiary  
2    objections, but just a matter of authenticity would be conceded  
3    by the government.

4                THE COURT:    Mr. Haanstad?

5                MR. HAANSTAD:    Well, that's right.    I mean, assuming  
6    that -- again, when the defense asked for publicly available  
7    information, again, it's nothing that the government intends to  
8    introduce in its case in chief and it's not otherwise  
9    discoverable under Rule 16.

10              To the extent that it's publicly available it doesn't  
11    trigger any Brady obligations on the part of the government.  
12    That was my response to those particular requests.

13              And to the extent that I was suggesting that the  
14    defense can go out and get these materials themselves, what I  
15    wanted to convey to Mr. Fahl was that, for example, if they can  
16    go on the Internet or to the library and get these ATF rulings  
17    that are public, the government's not going to object to the  
18    authenticity of those documents.

19              I don't want to state that too broadly just because I  
20    haven't seen what they intend to introduce yet, but assuming  
21    that the documents are obtained from a reasonably viable source  
22    like that I don't anticipate objecting to their authenticity.  
23    Probably to the relevance, but not to their authenticity.

24              THE COURT:    All right, that's noted.

25              Let's turn to other trial related issues.    In your

1 pretrial report you project a two-day trial. Are there any  
2 unusual evidentiary issues that might impact the length of the  
3 trial?

4 MR. HAANSTAD: From the government's perspective,  
5 Your Honor, the potentially -- the fact that it potentially has  
6 the greatest impact on the length of the trial relates to the  
7 issue of expert testimony. Each party has identified an expert  
8 witness, and based on what I know about the defendant's expert  
9 at this point it's the government's contention that he should  
10 not be qualified to testify as an expert.

11 And our position is based on the fact that, first of  
12 all, we don't believe that he has adequate qualifications to  
13 satisfy the requirements of Rule 702. But also, again, it's not  
14 clear at all from the summary that's been provided so far what  
15 relevant evidence he's going to have to offer. And to a large  
16 degree the discovery request that's been made is tied up closely  
17 with this proffered expert testimony.

18 This is an expert who to this point has never ever  
19 seen this specific firearm and has not been present for any test  
20 firings of the firearm. I don't believe that he's seen the  
21 video of the test firing of the firearm that was ordered by  
22 Judge Stadtmueller last February. So the notion that he's going  
23 to be able to come in and testify that this particular firearm  
24 does not fire automatically more than one round with a single  
25 function of the trigger is difficult to grasp.

1           It appears based on these discovery requests and what  
2 we know about this proposed expert that the intent instead is to  
3 come in and offer broad criticisms of ATF both with regard to  
4 prior rulings that they've made and with regard to current  
5 testing procedures. I think I made our position clear with  
6 respect to the relevance.

7           THE COURT: So, are you suggesting then that there  
8 should be a Daubert examination of the defense witness in order  
9 to determine whether or not he's competent to testify with  
10 respect to the matters for which he will be tendered by the  
11 defense?

12           MR. HAANSTAD: Well, I think so, Your Honor. The  
13 difficulty I have is I still am not clear on what it is that  
14 they propose this expert to testify to.

15           Again, if he's going to come in and testify that this  
16 particular firearm, based on what I don't know, that this  
17 particular firearm does not fire more than one shot with a  
18 single function of the trigger, I think that we're in the Rule  
19 701 and Rule 602 area and he doesn't have to be qualified as an  
20 expert, that is, if he can testify based on his firsthand  
21 knowledge or some sort of personal perception that this firearm  
22 does not fire automatically.

23           But I'm getting the sense from the defense that that's  
24 not what they're proposing here, that it's broader than that.  
25 And if that's the case then I think we are in Rule 702 area.

1 And if we are in the area of Rule 702, it still remains unclear  
2 what testimony he's going to be able to provide that is in any  
3 way going to be useful for the jury in determining a fact in  
4 issue in this case.

5 And if we get over that hurdle, then I think it's  
6 still useful to explore his qualifications and the other Rule  
7 702 factors.

8 THE COURT: Mr. Fahl?

9 MR. FAHL: Yes. Perhaps I can clarify. I don't  
10 believe that Mr. Savage is going to deny that under the  
11 restrictions of the test it fired multiple times. The question  
12 is whether or not multiple firings qualifies it as a machine  
13 gun. And there's a malfunction, whether or not this gun  
14 malfunctioned, and whether or not that malfunction could be  
15 brought about by using soft primered ammunition.

16 As to otherwise what else has been considered under  
17 ATF rulings and individual determinations in his experience of  
18 negotiating the placement or displacement of weapons on an NFTA  
19 registry, whether or not this gun, based on even the tests that  
20 have already been done, should be placed on that registry. It's  
21 his opinion that this is not a machine gun.

22 This is the same exact firearm -- same exact model of  
23 firearm that was issued in the case Staples vs. United States.  
24 And this issue was kind of litigated through the courts there,  
25 and I think there was a similar concern about the nature of the

1 firearm as to whether or not it should be classified as a  
2 firearm.

3           So, we can arrange, we have at this point a refundable  
4 ticket with Mr. Savage coming in on Sunday afternoon. I don't  
5 believe an extensive examination of the firearm would be needed.  
6 Something we could probably even do over a break on Monday  
7 before the expert testimony takes place, which I would hope it  
8 would alleviate some of Mr. Haanstad's concerns.

9           MR. HAANSTAD: Judge, Mr. Fahl says that some of the  
10 testimony, or one way in which this proposed expert testimony is  
11 going to be useful will be in determining whether multiple  
12 firings qualify a firearm as a machine gun. The statute  
13 provides that that's the case. That is, Title 26 USC Section  
14 5845(b) provides that a machine gun is any weapon which shoots  
15 automatically more than one shot by a single function of the  
16 trigger. And that's the jury instruction that the defense has  
17 agreed to.

18           MR. FAHL: There's actually a comment, I noticed -- I  
19 just noticed now that we submitted some language from the  
20 Staples case which talks about firing until the trigger is  
21 released or until the magazine is emptied. That language is  
22 from Staples and then was adopted by the Seventh Circuit in the  
23 Fleischli case which I don't believe is necessarily the case.  
24 There was five-round bursts and then it jammed, in which case  
25 the firearm did not fire until the trigger was released or until

1 it emptied the magazine.

2 Then I believe that was the instruction that I  
3 submitted to Mr. Haanstad yesterday afternoon, but I just now  
4 noticed it wasn't in the amended final pretrial report.

5 THE COURT: You're saying that in the test firing here  
6 there was a jam.

7 MR. FAHL: I believe so. One of the test fires there  
8 was a jam.

9 THE COURT: All right.

10 MR. FAHL: And the factual witnesses from the people  
11 who were firing the weapon at the Berlin conservatory all talked  
12 about it firing at five-round bursts and then it jammed.

13 THE COURT: So what does that have to do with  
14 Mr. Savage's qualifications to testify?

15 MR. FAHL: Well, that goes to -- first, Judge, that  
16 was what he was going to testify about. As far as his  
17 qualifications, I think that's something that's better done  
18 through a voir dire of Mr. Savage. I can submit his CV. I know  
19 he has testified in a federal court case in Washington, United  
20 States vs. Kwan. He was qualified as an expert witness there.

21 Even Mr. Haanstad's own -- I actually don't know if  
22 it's going to be his witness, but somebody he has brought in,  
23 Mr. Vasquez from the ATF has had multiple [Inaudible] with  
24 Mr. Savage, and I believe, you know, their relationship is fine.  
25 I don't believe Mr. Vasquez, unless -- I haven't heard

1 differently, has any problems with Mr. Savage because Mr. Savage  
2 is somebody who designs and manufactures firearms, he used to  
3 deal with ATF often to make sure that his firearms are in  
4 compliance.

5 He has extensive skill. He's taken a number of armory  
6 courses. He designs and manufactures his own guns. And it's  
7 very complicated to create a sort of rifle like this that is not  
8 easily --

9 THE COURT: For example, what? What does he design?

10 MR. FAHL: He's designed a number of rifles. And he's  
11 designed the Bren MKII SA, the Bren felt fed, the RPD SA, the  
12 SGM SA and the 971 Sport Rifle, the Gunzilla project --

13 THE COURT: What about the Bren MKII SA?

14 MR. FAHL: Pardon?

15 THE COURT: Did he design the Bren MKII SA?

16 MR. FAHL: Yes. If you would like, Your Honor, I  
17 could give you a copy of his CV which lists the firearms that he  
18 has designed, the firearms.

19 THE COURT: It certainly would be helpful to have that  
20 information in front of me when we proceed. It's not  
21 necessarily now obviously. I'll take it, but it's not  
22 essential. Thank you.

23 MR. HAANSTAD: And, Judge, I did receive from defense  
24 counsel I think it was about a week and a half ago a faxed copy  
25 of that CV and have been attempting to go through sort of point

1 by point and determine whether it's all it purports to be. And  
2 I can say that some of it appears from the government's  
3 perspective at least to be quite misleading. And it calls into  
4 question --

5 THE COURT: One second. Mr. Fahl, you handed up this  
6 information, I'm just wondering whether or not you'd like  
7 this -- only part of this information tendered. The first  
8 sheet. Is that something you want to keep?

9 Go ahead.

10 MR. FAHL: In the end, Your Honor, I think this is  
11 something that is best decided when Mr. Savage is present.

12 THE COURT: I think you're right.

13 MR. FAHL: We could go over his resume all day, but if  
14 he can answer these questions and the credibility in your eyes  
15 as he answers these questions I think will be determinative.

16 THE COURT: Well, obviously the most appropriate time  
17 is after the government has completed its case, unless you agree  
18 that it is acceptable to have this examination take place prior  
19 to the impanelment of the jury.

20 MR. FAHL: I think after the case in chief. I mean,  
21 depending on what happens, I mean, it could be quite possible  
22 Mr. Savage doesn't even have to testify. But we don't know how  
23 the government's case in chief is gonna go. And in that sense  
24 there's potentially that we could, you know, save ourselves some  
25 time and effort.

1           THE COURT: All right. But it does look like we may  
2 need to have some extra time built into our schedule for a  
3 Daubert examination.

4           All right, let's talk about other trial related  
5 matters. You mentioned the instructions. Are there any  
6 significant disagreements with respect to instructions?

7           MR. HAANSTAD: Your Honor, I think that there is with  
8 respect to the definition of a machine gun. And I apologize for  
9 this. I know that Mr. Fahl did send the defense's proposed  
10 instructions and I thought that I had incorporated all of them,  
11 but what he mentioned about Staples and the other case from the  
12 Seventh Circuit obviously didn't make its way into here. I must  
13 have just missed it because I don't know what those instructions  
14 said, so I'm not sure what our position is on that.

15           But there is another paragraph which as I noted in the  
16 final pretrial report there's some disagreement on. Defense  
17 seeks an instruction that provides that a weapon that fires  
18 automatically due to a malfunction of the weapon is not a  
19 machine gun for the purposes of the statute unless the  
20 malfunction is a result of an intentional manipulation of the  
21 weapon, to convert the weapon from a semi-automatic weapon to a  
22 machine gun.

23           I don't think that the defense has cited any authority  
24 for that proposition.

25           THE COURT: I can't imagine giving that kind of

1 instruction.

2 MR. FAHL: Maybe it's -- what I'm getting at,  
3 Your Honor, is --

4 THE COURT: A knife is not a knife unless it cuts you.  
5 That's essentially what you're saying.

6 MR. FAHL: Well, there's a scienter requirement in the  
7 statute. And if somebody, the first time a machine gun  
8 accidentally multiple fires, they're subject to prosecution.

9 THE COURT: But that's not the point. Your  
10 instruction as just read suggests that if something is capable  
11 of multiple firings as a machine gun, but on some occasion does  
12 not fire as a machine gun because of a malfunction, the gun is  
13 no longer a machine gun.

14 MR. FAHL: And that's definitely not --

15 THE COURT: And that seems to be the import of the  
16 instruction that was just read.

17 MR. FAHL: That's not what I intended to -- when you  
18 read the statute, it seems that there's a scienter requirement  
19 as to -- and it's even in the first part about the knowing  
20 possession. So a gun can malfunction and if the defendant is  
21 unaware that this malfunction was going to happen, it just  
22 doesn't seem like that is something that is covered by the  
23 statute.

24 Whereas, if a gun malfunctions and a person continues  
25 to use that malfunctioning gun as a machine gun, then that would

1 be covered by the statute. It seems that when you read the  
2 machine gun, 5845, 26 USC 5845, in conjunction with 922(o), I  
3 think there's a scienter requirement that must be there.  
4 Otherwise it becomes a strict liability.

5 MR. HAANSTAD: The scienter requirement I think is  
6 actually provided for in 924(a). But it's also incorporated in  
7 the first proposed jury instruction, the second element of which  
8 is that the defendant knew or was aware of the essential  
9 characteristics of the firearm which made it a machine gun.

10 MR. FAHL: What we were trying and attempting to do,  
11 albeit maybe very clumsily, was to indicate that there's a  
12 difference between something -- I mean, obviously you're gonna  
13 know that something functions as a machine gun if it fired five  
14 times. But the knowledge should almost predate the firing if  
15 you understand what I'm saying. It's that if something  
16 malfunctions by accident and fires multiple shots, and the  
17 government's suggestion is that a multiple shot automatically  
18 makes this a machine gun, you know, there would be a lot of  
19 people under this kind of strict liability theory would be  
20 subject to prosecution possessing a machine gun even though it  
21 was the mere malfunction that taking it to a gun shop could have  
22 fixed.

23 And I'm trying to somehow differentiate those two  
24 possibilities. I apologize for the clumsy wording of it.

25 THE COURT: Yeah, I think I understand the position

1 you're taking, but as articulated the instruction seems to miss  
2 the mark.

3 MR. FAHL: I understand. I'd be happy to take another  
4 crack at it, Your Honor, and do something that doesn't seem so  
5 severe maybe.

6 THE COURT: I think that would be an appropriate way  
7 to proceed. So why don't you re-craft that.

8 MR. FAHL: I will, thank you, Your Honor.

9 THE COURT: Mr. Haanstad, is there another instruction  
10 that's problematic from the government's perspective?

11 MR. HAANSTAD: The only other instruction that the  
12 defense requested that I didn't include in the joint final  
13 pretrial report was a definition of "possession."

14 I think -- the defendant here is not charged with  
15 possession of a machine gun, he's charged with transferring a  
16 machine gun. Consequently, the government has provided the  
17 elements for transfer and has provided the definition of  
18 "transfer."

19 I think that -- if I'm not mistaken, I think what the  
20 defense wants to be able to do is to suggest that possession of  
21 a machine gun also is a criminal offense. And because it is,  
22 the informant in this case was arguably guilty of possessing a  
23 machine gun and, therefore, had an incentive or has an incentive  
24 to come in and testify falsely in order to curry favor with the  
25 government.

1 I guess the government's concern is that by needlessly  
2 including this definition of possession along with the elements  
3 of the offense, there might be some confusion on the part of the  
4 jury as to what exactly it is that's charged here. The statute,  
5 again, covers both, transferring and possession, but we've  
6 clearly charged Mr. Olofson with transferring a machine gun.

7 THE COURT: Mr. Fahl? Why do we need a possession  
8 instruction?

9 MR. FAHL: As I'm thinking about it, Your Honor, I'm  
10 fine leaving out the possession. The purpose was as  
11 Mr. Haanstad described, and we can do that other ways, we don't  
12 need the instruction in there.

13 THE COURT: All right, the defense instruction  
14 concerning possession is withdrawn.

15 MR. FAHL: And I just want to make clear, I'm not sure  
16 what we stood on including in the definition of machine gun, the  
17 definition of fully automatic and the trigger [Inaudible] firing  
18 until its completed. That's from footnote 1 in Staples vs.  
19 United States. We'd like that in there and I don't know if the  
20 government is conceding that should be in there or if they're  
21 taking a contrary position.

22 THE COURT: Mr. Haanstad?

23 MR. HAANSTAD: At this point the government's position  
24 is that it should not be in there. It's not required under the  
25 plain reading of the statute, but -- I have to say I haven't

1 looked at footnote 1 of Staples. Like I said, I, for whatever  
2 reason, I apparently missed that reference in the proposed  
3 instructions that were sent by the defense. So I'll take  
4 another look and see whether I'm persuaded.

5 But at this point, again, it just seems to be  
6 inconsistent with the statutory definition which provides that a  
7 machine gun is any weapon that shoots more than one shot without  
8 manual reloading by a single function of the trigger. More than  
9 one shot obviously doesn't, on its face at least, require the  
10 complete emptying of the cartridge.

11 THE COURT: I'll look at Staples also. So we'll  
12 reserve judgment on that. Is there anything else?

13 MR. HAANSTAD: No, Your Honor.

14 THE COURT: Mr. Fahl? Do you have any difficulties  
15 with the instructions the government wants?

16 MR. FAHL: No, not than as otherwise I've already  
17 stated.

18 THE COURT: All right, and so the court then will  
19 generally use its boilerplate including the functions of the  
20 court and jury, what constitutes evidence, what is not evidence,  
21 definition of direct and circumstantial evidence, testimony of  
22 witnesses, deciding what to believe, weighing the evidence  
23 inferences, attorney interviewing witnesses, number of  
24 witnesses.

25 And then we go to the indictment. The nature of the

1 crime charged. Presumption of innocence. Burden of proof.  
2 Weighing expert testimony. And at this point we will probably  
3 have knowingly, the definition. And of course the substantive  
4 charge in this case. And definitions. Plus, the jury's  
5 recollection controls in addition to the court's summary  
6 instruction at the end regarding the selection of the  
7 foreperson, et cetera. All right?

8 Now, with regard to trial practice and procedure, I do  
9 want to note for the record, Mr. Olofson, that the court does  
10 conduct side bar conferences out of the hearing of the jury and  
11 uses so-called white noise during those conferences. You as the  
12 defendant have the right to attend all side bar conferences and  
13 to be present during every aspect of this case, unless you  
14 choose not to participate or otherwise attend.

15 What that means is if we go to the side bar, which is  
16 to your right and my left near the window, you can come up, or  
17 stay at your seat if you don't want to participate in the side  
18 bar conference. All right? Do you understand that?

19 THE DEFENDANT: I understand, Your Honor.

20 THE COURT: You can make the decision either now or  
21 later. And if you decide not to participate in any side bar  
22 conferences by your absence, that will be deemed a waiver of  
23 your participation in that side bar conference only. So you can  
24 attend some, you can attend all, or you can attend none, it's up  
25 to you. All right?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Now, with respect to testimony, you of  
3 course have an absolute right not to testify in this case, and  
4 if you choose not to testify we will have a discussion outside  
5 the presence of the jury for that purpose, that is, to make  
6 clear you are choosing not to testify or, on the other hand, you  
7 are choosing to testify. Do you understand?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Now, with respect to jury selection. Each  
10 side of course has the statutory number of peremptory  
11 challenges. Given the proposed length of trial the court would  
12 expect to impanel 13 jurors and would ask the parties whether or  
13 not there is any preference with respect to the selection of the  
14 alternate.

15 I will tell you my usual practice is to have each side  
16 exercise one additional challenge. That is, the government  
17 would get seven strikes and the defense would get 11 strikes,  
18 and the alternate juror would be selected randomly at the end.  
19 So that we would impanel 13 and then at the end of the trial we  
20 would throw all 13 numbers into the mixer, pull out one and that  
21 person would be dismissed after the jury has been instructed and  
22 after that person has been advised that they should remain  
23 available to rejoin the jury panel in the event all 12 jurors  
24 cannot convene and deliberate until a verdict is reached.

25 Is that acceptable or do you wish to follow the strict

1 Federal Rules of Criminal Procedure and/or some other procedure?

2 MR. FAHL: That's acceptable to the defense,  
3 Your Honor.

4 MR. HAANSTAD: It is for the government too,  
5 Your Honor.

6 THE COURT: All right, we will do it that way. The  
7 court also gives to the parties an opportunity to supplement the  
8 court's voir dire by asking questions of their own to the entire  
9 panel. Do you wish to avail yourself of that opportunity?

10 MR. HAANSTAD: The government does not, Your Honor.

11 THE COURT: Mr. Fahl?

12 MR. FAHL: I guess generally no, but if an issue comes  
13 up we'd like to reserve the right to do so if we feel it's  
14 necessary.

15 THE COURT: All right. If we need to discuss  
16 challenges for cause we will do that in the jury room, and if it  
17 becomes necessary to interview any one or more of the jurors  
18 with respect to matters that should not be shared with the panel  
19 as a whole, we will do that in the jury room. Is that  
20 acceptable to both sides?

21 MR. HAANSTAD: Yes, Your Honor.

22 MR. FAHL: Yes, Your Honor.

23 THE COURT: Is there any other matter that we need to  
24 entertain today?

25 MR. HAANSTAD: Not from the government, Your Honor.

1 MR. FAHL: Not from the defense, Your Honor.

2 THE COURT: All right, we are number one for jury  
3 selection on the day of trial, so be prepared to proceed at the  
4 beginning of the day.

5 MR. HAANSTAD: Okay.

6 THE COURT: Please let me know say within -- well,  
7 today is Thursday, so by Monday, Mr. Haanstad?

8 MR. HAANSTAD: Okay.

9 THE COURT: -- what the government's position is and  
10 we will have a brief conference to discuss any matters that need  
11 to be resolved as a result of your determination.

12 MR. HAANSTAD: Okay, thank you, Your Honor.

13 THE COURT: So talk with Kris about scheduling  
14 something if it becomes necessary.

15 MR. HAANSTAD: Okay.

16 THE COURT: All right?

17 MR. FAHL: Thank you, Your Honor.

18 THE COURT: All right, is there anything that we need  
19 to attend to in terms of your use of the courtroom, your use of  
20 Elmo, computers, sound system?

21 MR. FAHL: I don't believe so.

22 MR. HAANSTAD: No, Your Honor.

23 THE COURT: Are there any issues with respect to  
24 displays or demonstrative evidence during opening statements? I  
25 don't want any last-minute surprises about the use of things

1 that were not displayed to the other side.

2 MR. HAANSTAD: Judge, we've got, I think the  
3 government has 16 items identified on the exhibit list at this  
4 time. It's possible that some of those items will be displayed  
5 during opening.

6 I guess another question I have, obviously this case  
7 involves a machine gun which we intend to display to the jury  
8 throughout the trial. And to the extent that it's necessary to  
9 show the jurors sort of the inner mechanical workings of that  
10 gun I guess I just wanted to raise that as an issue.

11 I don't think we have in mind putting the gun up and  
12 having an expert physically pull the trigger on it to show what  
13 happens because we've got some diagrams and things like that  
14 that demonstrate that without the need for sort of dry firing  
15 this weapon. But the weapon will be pointed around the  
16 courtroom a little bit I think in the course of people  
17 testifying about the mechanics of it.

18 THE COURT: Well, I do want it to be clear that it's  
19 my practice to have a bailiff check any weapons that are brought  
20 in the courtroom. They should be made inoperable when they come  
21 into the courtroom.

22 MR. HAANSTAD: Okay.

23 THE COURT: So appropriate safety restraints have to  
24 be put on the weapon in advance and the bailiff has to check  
25 those items. During the last trial I had involving multiple

1 firearms I will tell you that the jury was a bit put off by the  
2 way the firearms were being mishandled in the courtroom and  
3 pointed at people even though there were plastic straps through  
4 the weapons to make sure that they were inoperable. I just want  
5 to make both sides aware of that. You don't do yourself any  
6 favors if you mishandle a weapon in front of a jury.

7 All right?

8 MR. FAHL: Thank you, Your Honor.

9 THE COURT: Thank you much.

10 MR. HAANSTAD: Thank you.

11 (Audio file concluded at 13:16:44 p.m.)

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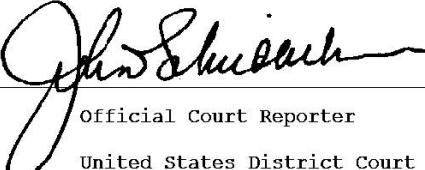
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1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF WISCONSIN  
3

4 I, JOHN T. SCHINDHELM, RMR, CRR, Certified Transcriber  
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11 Dated June 10, 2008, at Milwaukee, Wisconsin.

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14 Official Court Reporter  
United States District Court  
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